

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DAVID MCCARREN,

Defendant-Appellant.

UNPUBLISHED

January 12, 2012

No. 299836

Oakland Circuit Court

LC No. 2010-230549-FH

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Michael David McCarren appeals as of right his jury trial convictions of felon in possession of a firearm,¹ felonious assault,² two counts of carrying or possessing a firearm when committing or attempting to commit a felony (“felony-firearm”),³ and domestic violence (third offense).⁴ McCarren was sentenced as a fourth habitual offender⁵ to 19 months to 20 years in prison for felon in possession of a firearm, two years with 221 days credit for each felony-firearm conviction, 19 months to 15 years for felonious assault, and 19 months to 15 years with 221 days credit for domestic violence. We affirm.

On appeal, McCarren first argues that the trial court incorrectly scored offense variables (“OVs”) four and nine. We disagree. This Court reviews a trial court’s scoring of OVs under the sentencing guidelines for an abuse of discretion.⁶ A “scoring decision for which there is any evidence in support will be upheld.”⁷

¹ MCL 750.224f.

² MCL 750.82.

³ MCL 750.227b.

⁴ MCL 750.81(4).

⁵ MCL 769.12; MCL 769.13.

⁶ *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

⁷ *Id.* (quotation omitted, citation omitted).

The record supports a score of ten points for OV four. The sentencing guidelines provide that a score of ten points is appropriate where a defendant caused serious psychological injury to a victim that may require professional treatment.⁸ The fact that treatment is not sought is not conclusive when scoring this variable.⁹ Further, a victim's testimony regarding fear during an encounter with a defendant is sufficient to support a score of ten points for OV four.¹⁰

The evidence shows that McCarren pointed a gun at his wife, Shelly McCarren, during a heated argument, while his step-daughter, Jynelle Holland, was in the home. Shelly McCarren testified to previous domestic violence incidents, and also stated that she was "scared to death" on the night in question. Holland also stated that she was afraid that evening and exhibited emotion during her testimony. Further, the Presentence Investigation Report (PSIR) indicates that Holland still worries that McCarren will come after her mother. While neither Shelly McCarren nor Holland assert that they were psychologically affected, the evidence supports a score of ten for OV four.¹¹ As such, the trial court did not abuse its discretion when it scored OV four at ten points.

OV nine was also properly scored at ten points. OV nine requires a score of ten points if a defendant placed two to nine victims "in danger of physical injury or death."¹² In assessing who is a victim under OV nine, a court must count each person who is "placed in danger of physical injury or loss of life."¹³

McCarren argues that the only victim in this case was Shelly McCarren. Holland, however, was also present that evening, called 911, and was the one to retrieve the gun from where it had been placed by McCarren. Additionally, Holland testified that she was afraid that evening. As such, Holland was also placed in danger of physical injury or loss of life. The fact that Shelly McCarren was the only victim of domestic violence and felonious assault does not preclude a finding that Holland was also a "victim" under OV nine.¹⁴ Thus, there was no abuse of discretion when the trial court scored OV nine at ten points.

McCarren also contends that defense counsel was ineffective for failing to object to the scoring of OVs four and nine. We disagree. McCarren failed to move for a hearing or a new trial in the trial court based on ineffective assistance of counsel. Therefore, this Court is limited in its review to errors apparent on the record.¹⁵ The determination of whether a defendant was

⁸ MCL 777.34(1)(b); *People v Ericksen*, 288 Mich App 192, 202-203; 793 NW2d 120 (2010).

⁹ *Ericksen*, 288 Mich App at 202-203.

¹⁰ *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

¹¹ *Id.*; *Ericksen*, 288 Mich App at 202-203.

¹² MCL 777.39(1)(c).

¹³ MCL 777.39(2)(a); *People v Waclawski*, 286 Mich App 634, 682; 780 NW2d 321 (2009).

¹⁴ *People v McGraw*, 484 Mich 120, 128; 771 NW2d 655 (2009).

¹⁵ *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

deprived of his constitutional right to counsel because of ineffective assistance is reviewed de novo on appeal.¹⁶

To demonstrate ineffective assistance of counsel, McCarren must show that defense counsel's "performance fell below an objective standard of reasonableness and this performance prejudiced him."¹⁷ McCarren must also overcome the strong presumption of reasonable professional assistance.¹⁸ Trial counsel is not ineffective for failing to advocate a meritless position.¹⁹

At sentencing, defense counsel advocated for a downward departure from the guidelines to reduce McCarren's sentences. The trial court disagreed. McCarren has failed to demonstrate any error on the record and thus fails to overcome the presumption that defense counsel was providing reasonable professional assistance.²⁰ The fact that defense counsel did not object to the scoring of OV's four and nine does not warrant a finding that defense counsel was ineffective because the scoring was appropriate and any objection would have been meritless.²¹ As such, McCarren's argument must fail.

Since the trial court properly scored OV's four and nine, and McCarren has failed to show ineffective assistance of counsel, McCarren is not entitled to resentencing.

Affirmed.

/s/ Christopher M. Murray

/s/ Michael J. Talbot

/s/ Deborah A. Servitto

¹⁶ *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

¹⁷ *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004).

¹⁸ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

¹⁹ *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

²⁰ *Rockey*, 237 Mich App at 76.

²¹ *Snider*, 239 Mich App at 425.